IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1003

WINTHROP TAYLOR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

WALTER R. KUHN,
Counsel for Petitioner.

February, 1945.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the Circuit Court of Appeals for the Second Circuit in the above-entitled case entered December 26, 1944, denying the petition herein to review and set aside a judgment of the Circuit Court of Appeals for the Second Circuit. No opinion was rendered by the Circuit Court of Appeals in denying the petition.

A transcript of the record of the case, including the proceedings in the Circuit Court, is furnished herewith in accordance with Rule 38 of this Court.

Jurisdiction

The statute under which jurisdiction is invoked is Section 347 (Judicial Code, 28 U. S. C., Section 240, Amended) (a).

Summary Statement of the Matter Involved

The decision of the Circuit Court of Appeals which this Court is asked to review is in a proceeding in equity based upon a petition, affidavit and exhibits filed pursuant to the authority of the decision of this Court in *Hazel-Atlas Glass Company* v. *Hartford-Empire Company,* 322 U. S. 235. The petition requested the Circuit Court (C. C. A., 2nd) to review and set aside its judgment affirming a deficiency assessment of personal income tax for the year 1929. The judgment was entered April 22, 1935. The opinion of the Circuit Court is reported in *Taylor* v. *Commissioner,* 76 F. 2d, 904.

The deficiency assessment was based upon the *exclusive* determination of the Commissioner of Internal Revenue that, because of the large volume of sales of stocks in the panic months of October-November, 1929, the petitioner was considered to be a dealer in securities and hence was not entitled to the benefit of the capital gain rate of 12½% on profits realized from the sale of Public Service Corporation shares which the petitioner had acquired and held for more than two years prior to sale (p. 34, Ex. C, at p. 2). Other than this determination by the Commissioner, the petitioner's tax return for 1929, as the result of examination and verification, was found to be in all respects correct except for the allowance of a small *overassessment* (p. 32, Ex. B). In other words while *both the Commissioner and the petitioner have always been in agreement with respect to the amount of the petitioner's net taxable income for 1929,* the Commissioner took the position that it should all be treated as ordinary income and not capital gain because of the large volume of sales, as above stated.

From this determination of the Commissioner the petitioner appealed to the Board of Tax Appeals. At the hearing before the Board the petitioner (and for the first time) was asked to prove that he had not sold Public Service shares prior to October, 1929, on the theory that under "first in-first out" had he done so such sales would have disposed of or "eaten up" the early purchased shares before the running of the two year holding period, leaving no (or less) capital asset shares for sale in October-November, 1929. Although not part of the Commissioner's determination from which the appeal was taken, petitioner accepted this additional burden and testified, without contradiction, that there had been no such prior sales. While the Board found that Public Service shares held for more than two years, i.e., capital asset shares, had been sold and a capital gain realized, the Board affirmed the determination of the Commissioner that based upon the volume of the stock transactions petitioner was a dealer in securities—and despite the uncontradicted evidence that the petitioner was an active practicing lawyer. No evidence was offered by the Commissioner and no real factual dispute was involved. Upon the question of law as to whether the petitioner could be deemed a dealer in securities solely because of the volume of sales, the petitioner appealed to the Circuit Court of Appeals for the Second Circuit.

The Circuit Court reversed the Board with respect to the nature of the petitioner's business or profession and found that he was entitled to claim a capital gain and be taxed accordingly. With respect, however, to whether the petitioner had sold Public Service shares, acquired and held for more than two years prior to sale, the Circuit Court rendered a tangent and unrelated decision holding that because of a lack of certain evidence respecting *other sales* of Public Service shares in October-November, 1929, which had been held for less than two years, the matter had been (to quote the language of the Circuit Court's opinion) "left in the air" and, "unsatisfactory" as it was,

affirmed *on this wholly negative basis* the deficiency assessment. In so doing the Circuit Court made a palpable and fundamental error apparent on the face of its opinion, it appearing therefrom as a mathematical certainty that the petitioner had sold many thousands of Public Service shares acquired and held for more than two years prior to sale from which he realized a large capital gain. (*In fact the petitioner's net taxable income for 1929 consisted exclusively of capital gain* [pp. 90, 91].) The error of the Circuit Court, the gross injustice of the judgment and the circumstances with respect to the lack of evidence are set forth in the petition and affidavit including the additional evidence of the "other sales" which completely confirm the error made by the Circuit Court and which, had it been before the Court, would doubtless have resulted in a judgment in favor of the petitioner.

No material fact is in dispute and the gross injustice of the judgment sought to be set aside is conceded by the respondent. The petition sets forth in detail the payment in full by the petitioner of income tax for 1929 at the capital gain rate of 12½%, with interest, amounting to $69,540.83 upon a taxable income *consisting exclusively of a net capital gain*,—agreed to be $538,011.74 (pp. 15, 26, 27, 90, 91; Exhibits B and C, pp. 32-34,—the *additional* deficiency tax, with interest, amounting to over $100,000 having been assessed on the admittedly and clearly erroneous basis that said capital gain constituted ordinary income subject to tax at normal and surtax rates.

The petition shows that after the entry of the judgment the petitioner marshalled all pertinent data and submitted it in conjunction with the opinion of the Circuit Court to the Commissioner of Internal Revenue to convince him of the error which had been made so that the gross injustice might be rectified. This involved a long period of effort in the various departments of the Bureau following the discovery of lost records. As a result the Commissioner conceded the grievous error that had been made, but finally, on October 17, 1944, concluded that he had no

authority under Section 3761 of the Internal Revenue Code as construed by the Attorney General of the United States to correct the error, and advised the petitioner accordingly (pp. 14, 15, 16, 26, 27, 28). Meanwhile (on May 15, 1944) this Court decided the *Hazel-Atlas Glass Company* case (supra), clarifying the power and duty of the Circuit Court in an equitable proceeding to correct, no matter how belatedly, grossly unjust judgments, and pursuant to such authority the petitioner instituted this proceeding.

The answer of the respondent does not deny or qualify the averments of the petition. Counsel for respondent, however, challenged the power of the Circuit Court to review and set aside its judgment, citing *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, and *Monjar* v. *Commissioner*, 140 F. 2d, 263 (C. C. A., 2d). The answer also states that the *Hazel-Atlas Glass Company* case (supra), relied upon by the petitioner, is not applicable since fraud is not involved (Respondent's Answer—Appendix, p. 17).

Questions Presented

(1) (a) Does the decision of the Supreme Court in the *Simpson* case exclude taxpayers (after a judgment has become "final" under Section 1140 of the Internal Revenue Code) from instituting proceedings in equity to review and set aside upon recognized equitable grounds manifestly unconscionable judgments,—and even when the material facts are not in dispute and the gross injustice is conceded?

(b) Did the Supreme Court by its decision in the *Simpson* case exclude concededly grossly unjust judgments *involving taxpayers* from the application of the principles and procedure approved by it in the *Hazel-Atlas Glass Company* case?

(2) The decision of the Second Circuit Court in the case of *Monjar* v. *Commissioner* (supra) (followed by the Cir-

cuit Court in denying the petition herein) is in conflict with the decision of the Fifth Circuit Court in the case of *Buttengenbach* v. *Commissioner,* 63 F. 2d, 630. Which Circuit is right?

(3) There being no dispute as to the material facts, the error being apparent and the gross injustice of the judgment sought to be set aside being conceded, was it not the duty of the Circuit Court (under the decision of the *Hazel-Atlas Glass Company* case) to set aside the judgment though fraud is not involved?

(4) Where a fundamental error is apparent on the face of the opinion of the Circuit Court due to mistake, unmixed with negligence on the part of the petitioner, resulting in a concededly grossly unjust tax judgment, the injustice of which is confirmed by newly discovered evidence which, through no lack of diligence on the part of the petitioner, was not before the Court, and there is no dispute as to the material facts, is it not the duty of the Circuit Court to set aside the judgment?

Reasons Relied On for Allowance of the Writ

(1) (a) The decision of the Circuit Court denying the petition under the authority of the *Simpson* case bars taxpayers, with respect to judgments which have become "final" under Section 1140 of the Internal Revenue Code, from instituting proceedings in equity to set aside such judgments although the material facts are not disputed and the gross injustice of the judgment is conceded. This constitutes an important jurisdictional question of Federal tax law which has not been but should be settled by this Court in the public interest.

(b) The decision of the Circuit Court in denying the petition excludes judgments affecting taxpayers from the application of the principles and procedure approved by this

Court in the *Hazel-Atlas Glass Company* case. This involves an important question of Federal tax law which has not been but should be settled by this Court in the public interest.

(2) The decision of the Second Circuit Court in the *Monjar* case (followed by its decision denying the petition herein) is in conflict with the decision of the Fifth Circuit Court on the same matter. To make for uniformity of decision, this conflict should be resolved by this Court.

(3) The error of the Circuit Court in the tax proceeding being apparent on the face of its opinion and a fundamental mistake having been made unmixed with negligence on the part of the petitioner resulting in a *concededly* grossly unjust judgment, and there being no dispute as to the material facts, the decision of the Circuit Court refusing to set aside the judgment is probably in conflict with applicable decisions of this Court,—and particularly the decision in the *Hazel-Atlas Glass Company* case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court.

WALTER R. KUHN,
Counsel for Petitioner.

February, 1945.

BRIEF IN SUPPORT OF PETITION

Opinions of the Court Below

The date of the decision of the Circuit Court sought to be reviewed herein is December 26, 1944. No opinion was filed by the Circuit Court of Appeals for the Second Circuit in denying the petition for the review and setting aside of its judgment.

Jurisdiction

Statute under which jurisdiction is invoked is Section 347 (Judicial Code, 28 U. S. C., Section 240, Amended) (a).

In accordance with Rule 38 of this Court cases believed to sustain the jurisdiction because of conflicts with decisions of this Court or between Circuits, or because undecided important questions of Federal law are involved, are:

Ivory Novelties Trading Company, Inc. v. *Francois Joseph De Sportuno Coty,* 276 U. S. 159; *Powers-Kennedy Contracting Corp.* v. *Concrete Mixing etc. Co.,* 282 U. S. 175, 176; *Saranac Automatic Mach. Corp.* v. *Wirebounds Patent Co.,* 282 U. S. 704, 705; *DeForest Radio Co.* v. *General Electric,* 283 U. S. 664; *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.,* 315 U. S. 759; *Williams Mfg. Co.* v. *United Shoe Machinery,* 316 U. S. 364; *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173; *Reynolds* v. *United States,* 292 U. S. 443; *Southern Railway Co.* v. *Walters,* 284 U. S. 190.

Statement of Case

The case, so far as material to the consideration of this application, is stated in the petition (pp. 2, 3, 4).

Specification of Errors

The errors which petitioner will urge if a writ of certiorari is granted are that the Circuit Court of Appeals for the Second Circuit erred in denying the petition for the following reasons:

(1) That the Circuit Court was not barred from exercising jurisdiction by the decision of the Supreme Court in the case of *R. Simpson & Co.* v. *Commissioner,* 321 U. S. 325, or any other pertinent decision.

(2) That the Circuit Court should have granted the petition under the authority of *Hazel-Atlas Glass Company* v. *Hartford-Empire Company,* 322 U. S. 238, and other applicable decisions.

Summary of Argument

The points of argument support in order the reasons relied upon for the allowance of the writ.

ARGUMENT

POINT I

An important question of Federal law is involved which has not been but should be settled by this Court in the public interest.

Denial of the petition by the Circuit Court based upon the objection raised in the respondent's answer, to the effect that under the authority of the *Simpson* case (supra), decided by this Court, the Circuit Court lacks jurisdiction, involves a question of Federal law important to the administration of justice and of the tax laws.

Specifically, whether or not taxpayers, after a tax judgment has become final under the provisions of Section 1140 of the Internal Revenue Code, are barred from instituting proceedings in equity to set aside grossly unjust judgments, *and particularly where the material facts are not disputed and the gross injustice is conceded,* is a question which has never been decided by this Court and its importance in the administration of justice is apparent. Did Congress, by the enactment of Section 1140 of the Internal Revenue Code, intend to exclude taxpayers from seeking relief from such judgments upon recognized equitable grounds?

To put the question another way: Are *taxpayers* suffering from concededly grossly unjust judgments excluded from the application of the remedial principles and procedure approved by this Court in the *Hazel-Atlas Glass Company* case (supra) and is such the import of the decision of this Court in the *Simpson* case?

It would not seem that the *Simpson* case decided any such question. The *Simpson* case did not involve a petition in equity for the review, on recognized equitable grounds, of an erroneous judgment manifestly unconscionable or grossly unjust. The Supreme Court in the *Simpson* case merely decided that "where under our rules our denial has become final", in conjunction with Section 1140 of the Internal Revenue Code defining finality in tax cases, it did not have jurisdiction *in the normal course of appeal procedure* to grant a rehearing of a petition for a writ of certiorari previously denied by it, the time for such an application having expired,—the Court pointing out that the intent of Congress in defining finality with reference to appeal procedures was to determine a time when the right of collection, suspended during appeal, begins to run again and assessment and collection may be made by the Commissioner.

This would seem to be a far cry from deciding in an extraordinary proceeding involving the review of a judg-

ment by the Circuit Court pursuant to inherent equity powers that Congress intended to render inapplicable *in the case of taxpayers* fundamental and long established equitable principles and procedure designed to prevent gross injustice caused by erroneous judgments. It would not appear that this Court either stated or implied any such conclusion. The Circuit Court by its denial of the petition based upon the respondent's answer has thus construed the *Simpson* case and, in effect, has imputed to Congress, from the language of Section 1140 of the Revenue Code designed to fix the time when assessment and collection can commence, a radical intent to single out the great body of taxpayers and deny to them ancient rights based upon basic considerations of equity and justice. Such an interpretation of the statute would seem to violate recognized canons of statutory construction.

The proceeding herein is extraordinary in its nature, the petition invoking the high equity powers of the Circuit Court to prevent a miscarriage of justice. The petition is in the nature of a bill for the review of and to set aside a judgment *concededly* grossly unjust and manifestly unconscionable because of fundamental error apparent on the face of the opinion of the Court, because of accident or mistake unmixed with negligence on the part of the petitioner, the error being confirmed by the additional evidence which through no lack of diligence on the part of the petitioner was not available at the hearing and had it been would doubtless have resulted in a judgment disallowing the deficiency assessment.

In the light of the broad pronouncements of this Court in the *Hazel-Atlas Glass Company* case, based upon a wealth of precedent, have, either under the *Simpson* or the *Monjar* cases, taxpayers been excluded from the right to petition in equity for relief from grossly unjust judgments, or did Congress, by the enactment of Section 1140 of the Internal Revenue Code, intend such a deprivation no matter how admittedly erroneous the decree or how concededly gross the resulting injustice?

POINT II

There is a conflict on the same matter between decisions of Circuit Courts of Appeals.

Denial of the petition by the Circuit Court, based upon the objection raised in the respondent's answer to the effect that under the authority of the *Monjar* case (supra), decided by the Second Circuit Court, that it lacks jurisdiction, is apparently in conflict with the decision of the Fifth Circuit Court in the *Buttengenbach* case (supra) involving the same matter.

Counsel for the respondent, in the answer, cited the *Monjar* case (supra), decided by the Second Circuit, as authority for a denial of the petition with respect to which the Circuit Court apparently agreed. In its opinion in the *Monjar* case the Second Circuit Court referred to and declined to follow the *Buttengenbach* case (supra), decided by the Fifth Circuit Court. Both these cases involved appeals to the Circuit Court from the denial of motions made by the taxpayer to the Tax Court, after the lapse of the thirty-day period, to reopen the cases for redetermination. The denial by the Tax Court was upheld by the Second Circuit Court in the *Monjar* case and was reversed by the Fifth Circuit Court in the *Buttengenbach* case.

It is of interest to note that in allowing the case to be reopened after the thirty-day period had elapsed, the Fifth Circuit Court in the *Buttengenbach* case expressed itself in terms of equitable principles pertinent to the review and setting aside of a judgment. In the *Buttengenbach* case the deficiency assessment erroneously resulted from the taxpayer's "reliance upon the mistaken advice of a revenue agent", the respondent Commissioner agreed that an injustice was involved and, while respondent's counsel raised the jurisdictional point, did not oppose as to the merits. The motion to reopen the case was made after the thirty-day period. The Tax Court denied the motion and,

on review, the Fifth Circuit Court reversed and stated in its opinion:

> "The reviews mentioned in Section 1005 no doubt measure the taxpayer's right to litigate and the Board's decision is final on exhaustion or neglect of them as against further appeals. But it does not follow that the decision may not be further dealt with by the Board itself in its discretion *or that no extraordinary relief against it can ever be had.* Decisions of the Secretary of the Interior in matters affecting the public lands were by statute declared to be final *but that meant only to further appeals, and did not exclude the courts from inquiring in extraordinary cases whether the law had been violated thereby.* Johnson v. Tousley, 13 Wall. 72, 83, 20 L. Ed. 485." (Emphasis ours.)

POINT III

The Circuit Court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Denial of the petition by the Circuit Court, based upon the objection raised in the respondent's answer to the effect that the *Hazel-Atlas Glass Company* case (supra), decided by this Court, is limited to fraudulently begotten judgments, is apparently in conflict with the decision in that case.

(a) The *Hazel-Atlas Glass* case was decided by the Supreme Court May 15, 1944. The decree reviewed and directed to be reversed had become final nine years before. Its procurement involved fraudulent testimony. The matter was presented to the Circuit Court (C. C. A., 3rd) by a petition to that Court to review and set aside its judgment. The Circuit Court denied the petition and an appeal was taken to the Supreme Court. The Supreme Court reversed and directed the Circuit Court of Appeals to reverse its judgment and render judgment for the petitioner. This decision of the Supreme Court simplifies

and renders more speedy and flexible remedial action, pursuant to petitions in equity to review and set aside decrees under extraordinary circumstances resulting in gross injustice. Specifically, Circuit Courts of Appeals are empowered and, when the material facts are not in dispute, it is their *duty* to administer and execute such remedial action which considerations of equity and justice in the particular case and under the circumstances demand. While the decision of the Circuit Court denying the petition apparently upholds the respondent's answer that such relief must be predicated upon grounds of fraud,—"fraudulently begotten judgment",—such is not the law as the Supreme Court in its opinion, both majority and minority, clearly indicates,—based upon a long history of adjudications both in England and this country. *Fraud is but one of the circumstances* upon which equity will vitiate the decree, the opinion stating the rule comprehensively as follows:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect *that under certain circumstances, one of which is after discovered fraud,* relief will be granted against judgments regardless of the term of their entry. This equity rule which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. * * * But where the action is demanded, *where enforcement of the judgment is 'manifestly unconscionable'* * * * they have wielded the power without hesitation." (Emphasis ours.)

(b) The error, apparent in its opinion, having been made by the Circuit Court, the material facts not being in dispute, and the gross injustice of the judgment being conceded, was it not *the duty* of the Circuit Court to grant the petition in accordance with the principles and procedure approved by this Court in the *Hazel-Atlas Glass Company* case?

This Court in the *Hazel-Atlas Glass Company* case stated:

> "• • • Created to avert the evils of archaic rigidity, *this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.*" (Emphasis ours.)

In order to implement these principles this Court approved of the procedure whereby the equity powers of the Circuit Court were invoked by a petition asking that Court to hear and determine the matter. In situations where the facts are not in dispute, and it is clear that the judgment is grossly unjust, this Court held that the Circuit Court should, as a matter of duty, act forthwith. The opinion states:

> "Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed, the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require, argues against it. We hold, therefore, that the Circuit Court on the record here presented, had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions."

SUMMARY

The bald fact is that, through sheer error apparent on the record, the judgment sought to be set aside involves an unjust tax of over $100,000. The respondent Commissioner, honestly disposed, concedes the error and would correct it had he authority to do so. The denial of the petition by the Circuit Court leaves the Commissioner no choice but to enforce collection not of a tax properly due but what is tantamount to a legalized exaction. Should not the Circuit Court, under the circumstances, be able to correct its mistake and thus prevent the miscarriage of justice? Or

must the grave error, once made, forever stand and the gross injustice be perpetrated? Is such a result a concomitant of Congressional intent in the enactment of 1140 of the Internal Revenue Code? And is such a statutory construction in the true interest of the administration of public law? If so, it does violence to long established principles of equity and revolts the sense of justice. Why in the case of taxpayers should a judgment concededly erroneous and manifestly unconscionable be beyond the remedial reach of the Court which rendered it?

The questions involved are of fundamental importance. Every consideration would seem to render appropriate, under the rules of this Court, a review of the Circuit Court's decision.

Respectfully submitted,

WALTER R. KUHN,
Counsel for Petitioner.

February, 1945.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Answer to Petition for Review of Decree

Comes now the Commissioner of Internal Revenue, by his counsel, Samuel O. Clark, Jr., Assistant Attorney General, and states that the petition for review of decree should be dismissed for the following reasons:

Section 1140 of the Internal Revenue Code [1] provides an indicated period of time, upon the occurrence of which the decision of the Board of Tax Appeals (now the Tax Court of the United States) becomes absolutely final without power in the Board of Tax Appeals or any other tribunal to modify it thereafter. It was held in *R. Simpson & Co. v. Commissioner*, 321 U. S. 225, that this statutory provision deprived even the Supreme Court of jurisdiction over a case after its denial of certiorari became final. *A fortiori*

[1] SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL. The decision of the Board shall become final—

* * * * * *

(b) *Decision Affirmed or Petition for Review Dismissed.*—

* * * * * *

(2) *Petition for Certiorari Denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

Section 1005, 44 Stat. 110, of prior Revenue Acts, is identical.

it follows that the jurisdiction of this Court has likewise ended. See also *Monjar* v. *Commissioner,* 140 F. 2d 263 (C. C. A. 2d). *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 321 U. S. 238, relied upon by petition, is wholly inapplicable as it involved a "fraudulently begotten judgment."

For the above reasons this Court has no jurisdiction to review the decree.

(Sgd) SAMUEL O. CLARK, JR.
Samuel O. Clark, Jr.,
Assistant Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1003

WINTHROP TAYLOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PREVIOUS OPINIONS AND ORDERS

The decision of the court below (R. 95) denying *per curiam* a petition for review of the same court's order of April 22, 1935 (R. 87), is unreported. The memorandum opinion of the Board of Tax Appeals in the original proceeding (R. 48–51) is unreported. The opinion of the Circuit Court of Appeals (R. 82–86), affirming the decision of the Board, is reported at 76 F. 2d 904. The order of this Court denying taxpayer's petition for a writ of certiorari to review the Circuit Court's previous decision is reported at 296 U. S. 594. The order of this Court denying taxpayer's

petition for rehearing of the petition for writ of certiorari is reported at 296 U. S. 662.

JURISDICTION

The order of the Circuit Court of Appeals here involved was entered on December 26, 1944. (R. 96.) The petition for a writ of certiorari was filed on March 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to entertain taxpayer's petition to review and vacate its judgment filed April 22, 1935, affirming the decision of the Board of Tax Appeals, in view of the provisions of Section 1140 of the Internal Revenue Code and in view of the expiration of the term at which the judgment was entered.

2. Whether the court below, if it had jurisdiction, properly denied the petition for review in the exercise of its discretion.

STATUTE INVOLVED

Section 1140 of the Internal Revenue Code is set forth in the Appendix, *infra*.

STATEMENT

This proceeding was revived by the taxpayer in a petition for review by the court below of its judgment entered April 22, 1935 (R. 87), affirm-

ing an order of the Board of Tax Appeals sustaining the Commissioner's assessment of a deficiency in income tax for the year 1929 in the amount of $51,353.70. (R. 48.) Taxpayer, in filing his income tax return for the year in question, reported as capital net gain the sum of $490,006.67 on account of the sale of 14,000 shares of stock of the Public Service Corporation of New Jersey and paid a tax at the rate of 12½ percent. The Commissioner's determination of a deficiency resulted from his treating as ordinary income the amount returned as capital gain. (R. 43–46.) The 14,000 shares were part of a larger quantity of 35,000 shares which petitioner sold during the months of October and November 1929 (R. 84–85) and which had been acquired in smaller lots at various times during the preceding four years, except for 4,500 shares which had been acquired previously (R. 84).

The questions raised by the deficiency assessment were (1) whether the 14,000 shares in question were held primarily for sale in the course of trade or business and (2), if not, whether they were held as capital assets for more than two years. When the case came on for hearing before the Board, counsel for the Commissioner stated the issues (R. 60–61). The Board Member before whom the hearing took place stated that if the taxpayer was not taxable as a trader or dealer in securities, he would nevertheless be taxable upon the gain as income unless he were able to prove

by the history of the stock sold at particular times that the shares in question had been held at least two years. Counsel for the taxpayer stated that "we are prepared to do that up to a certain point". (R. 61–62.) Counsel for the Commissioner offered to accept the "first in, first out" rule, and it was then stipulated that the "first in, first out" rule should apply. (R. 62.)

At the close of the evidence, the Member inquired of taxpayer's counsel whether he thought taxpayer had made out a case and stated that taxpayer's proof did not show all of the purchases and sales. (R. 76–77.) After conference with his client, counsel stated (R. 77):

> If your Honor please, under the circumstances, we are not prepared to prove the rest of these sales for 1929, and it will take some little time to get that proof together, if we were permitted to produce it.

He also asserted that he felt that it was unnecessary to prove how the particular items of gain were made up since the sole point made in the sixty-day letter was whether or not taxpayer was a trader in securities. (R. 77.) To this the Board Member replied (R. 77–78):

> It is too late. That was to be said at the beginning and the point was made very clear and you accepted it. That was the issue, and that is the way you offered your testimony. You agreed with Mr. Morton. You cannot go back now and say that is not true; you have already made your state-

> ment here. That is the issue agreed to; you cannot change that. That is an accepted fact you have presented right here in court.

Taxpayer's attorney then requested "a brief holiday" (R. 78) to prepare further proof and the case was adjourned until two o'clock. After recess taxpayer's counsel stated that he had no further evidence to offer; that he felt the case as it stood was sufficient. (R. 78.) Upon motion of counsel for the Commissioner the petition was then dismissed. (R. 78–79.)

It appears from the present petition for review that during the recess taxpayer had telephoned his office to obtain the records regarding the other 21,000 shares which had been sold, but these could not be found. (R. 23.) He then conferred with his counsel as to the advisability of requesting an adjournment for a sufficient period to permit search for the records. Counsel advised him, however, that this was unnecessary since the missing evidence would only be corroborative of his previous oral testimony. Hence, at the resumption of the hearing, "counsel for the petitioner, confident that he was correct in his attitude, rested his case." (R. 24.) Taxpayer further states that after the original decision of the court below (in April, 1935), the file containing the missing records was discovered in the attic of his home, where it had been removed to make space available in his office. (R. 26.)

The Board sustained the Commissioner on the ground that the evidence did not establish that taxpayer was not a dealer in stocks and upon the further ground that he had not shown that the assets in question had been held for more than two years. (R. 48–51.)

The Circuit Court of Appeals in affirming the order of the Board concluded that the taxpayer was not a trader in securities and based its decision upon the sole ground that he had failed to meet the burden which rested upon him of showing that the stock had been held by him for more than two years. The court specifically rejected taxpayer's contention that the only question in the case was whether he was a trader in securities. (R. 86.)

Taxpayer then petitioned the court below for rehearing on the ground that it had erred in stating that one of the issues in the case was whether the assets had been held for over two years and, further, on the ground that he had proven to a "mathematical certainty" that the 14,000 shares had been held at least two years. (Printed petition for rehearing, p. 6, Docket No. 347, October Term, 1934, Circuit Court of Appeals for the Second Circuit, not included in the present record.) The court below denied the petition for rehearing on May 4, 1935.

Thereafter, substantially upon the same grounds, taxpayer petitioned this Court for a writ of

certiorari (October Term, 1935, No. 183). On October 14, 1935, his petition was denied (296 U. S. 594). A petition for rehearing was likewise denied by this Court on November 11, 1935 (296 U. S. 662).

The petition for review in the court below was filed more than nine years later.[1] It advances the view that, "Under the authority of *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, [322 U. S. 238], * * * a Circuit Court of Appeals has power at any time, for reasons of justice, to set aside its judgment or devitalize the same and recall its mandate even though the term at which it was entered had long since passed away." (R. 17.) It also avers that since the previous decision taxpayer "has made many and continuous efforts within various departments of the Bureau of Internal Revenue to correct the error [in the decision] and to obtain justice * * * and, as part of these efforts, discovered, tabulated and collated the purchase and sale notices covering the other 21,000 shares sold in October and November, 1929, together with the 14,000 shares, * * *." Taxpayer states that as a result of this tabulation it was discovered that his income tax return for 1929 erroneously understated the capital gain and overstated the ordinary income resulting from the sales of stock

[1] The supporting affidavit is verified December 4, 1944. (R. 29.)

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and that consequently a balance of tax of $3,148.28 was found to be due.

Taxpayer alleges that on April 28, 1942, he submitted to the Commissioner an "offer in compromise" and paid the balance of tax as calculated with interest amounting to $2,298.36. He asserts that in order to qualify the offer as a "compromise", at the suggestion of the Bureau of Internal Revenue, he offered to pay an additional $5,000 in full settlement of the liability. He also asserts that the Internal Revenue Agent in Charge in Brooklyn, New York, recommended acceptance and that the Commissioner of Internal Revenue, New York Division, Technical Staff, "with commendable candor conceded the justice and equity of the petitioner's contentions and that a fundamental error was involved in the decree of this Court but concluded that * * * the Commissioner of Internal Revenue had no authority to compromise or settle tax claims based upon the equities involved * * *" (R. 15–16.)

In his supporting affidavit, taxpayer incorporates a copy of a letter dated October 17, 1944, from the Commissioner, stating that

> Careful consideration has been given to the above offers and they are hereby rejected for the reason that the full amount of the tax liability appears to be collectible. There is no authority in law for the acceptance of a tax legally due for an amount less than can be collected. [R. 28.]

The Commissioner filed an answer in the court below, requesting dismissal of the petition on the ground that the court was without jurisdiction to review its decree. (R. 92–93.) The court denied the petition. (R. 95–96.) Certiorari is sought to review this action.

ARGUMENT

The court below denied the petition without opinion. (R. 95–96.) The denial is correct both on the ground that the court was without jurisdiction to entertain the petition and on the ground that, if the court had jurisdiction, its action was a proper exercise of discretion.

1. It is well settled by decisions of this Court and numerous decisions of the several circuit courts of appeals that pursuant to Section 1140 of the Internal Revenue Code (Appendix, *infra,* pp. 15–17), decisions of the Board become "final" at the times specified, without the qualifications which may exist in regard to ordinary judgments. The section was originally adopted as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9. Its purpose and effect are expressed in the committee report which recommended its adoption (S. Rept. No. 52, 69th Cong., 1st Sess., p. 37, (1939–1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the board (whether or not review thereof is had) is to become final.

> Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the commissioner's determination, commences to run upon the day upon which the board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

The explicit requirement of the statute deprives the court of its otherwise-existent jurisdiction to grant petitions for rehearing or otherwise exercise the traditional power to review and reconsider a judgment during the term at which it was entered. *Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225. Similarly, we believe, the court below was without jurisdiction to review its own order, and therefore the decision of the Board, for any reason more than nine years after denial of a petition for certiorari by this Court, which the statute specifies as an action that renders the decision of the Board final. Internal Revenue Code, Section 1140 (b) (2), Appendix, *infra*, pp. 15–17; cf. *R. Simpson & Co.* v. *Commissioner*, *supra*. In *Sweet* v. *Commissioner*, 120 F. 2d 77, 81, the Circuit Court of Appeals for the First Circuit said:

> From a reading of § 1005 [of the Revenue Act of 1926, identical with Section 1140 of the Internal Revenue Code] as a whole it is apparent that the old chancery practice with reference to bills of review has no place in the statutory scheme regulating the procedure for adjudicating tax disputes instituted before the Board of Tax Appeals.

To the same effect are *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 726, 727; *Crews* v. *Commissioner,* 120 F. 2d 749 (C. C. A. 10th), certiorari denied, 314 U. S. 664; *Swall* v. *Commissioner,* 122 F. 2d 324 (C. C. A. 9th); *McCarthy* v. *Commissioner,* 139 F. 2d 20 (C. C. A. 7th); *Monjar* v. *Commissioner,* 140 F. 2d 263 (C. C. A. 2d); *White's Will* v. *Commissioner,* 142 F. 2d 746 (C. C. A. 3d); cf. *Merrill* v. *United States,* 55 F. Supp. 674 (W. D. N. Y.).

There is no conflict between these cases and *La Floridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. 2d 630 (C. C. A. 5th), since the order of the Board there vacated was (p. 631)—

> not really a judgment of the Board representing its ascertainment of facts and application of the law to them, but is the agreement of the parties put into the form of a judgment, the order so reciting. The Board itself has on the face of its record never ascertained what, if any, taxes the taxpayer owed.

Therefore (p. 631):

> We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown.

If the cited case is deemed to go further, it has in effect been overruled by *Helvering* v. *Northern Coal Co., supra,* and *R. Simpson & Co.* v. *Commissioner, supra.* It has, however, been understood more narrowly and distinguished by the other circuit courts of appeals. *Swall* v. *Commissioner, supra; Sweet* v. *Commissioner, supra,* p. 81; *Monjar* v. *Commissioner, supra,* p. 265; *White's Will* v. *Commissioner, supra,* pp. 748, 749.

Hazel-Atlas Co. v. *Hartford Co.,* 322 U. S. 238, upon which taxpayer relies (R. 1–17, 28–29; Pet. 2–5), does not apply, for in that case there was no statute limiting jurisdiction to review. Here, Congress has chosen to fix irrevocably the termination of tax controversies at the times specifically prescribed. These statutory limits may not be disregarded upon petition for review.

Even without the statute, the court below upon well settled principles was without power to entertain the petition for review of its 1935 judgment. Unlike *Hazel-Atlas Co.* v. *Hartford Co., supra,* this is not a case of "after-discovered fraud" (322 U. S. 244), nor are the circumstances in any way similar. The asserted errors lie in

the record. As appears from the Statement, *supra,* they are, first, the consideration by the court below and by the Board of the question whether the stock involved had been held for two years and, second, the conclusion adverse to the taxpayer upon this issue. Neither alleged error involves fraud and both questions were completely litigated in the original proceedings, as the opinion of the Circuit Court of Appeals shows. (R. 82–86.) The same errors were urged originally, not only before the Board and in the argument to the Circuit Court of Appeals, but explicitly in the petition to the court below for rehearing and in the petitions for certiorari and for rehearing filed in this Court. Certainly *Hazel-Atlas Co.* v. *Hartford Co., supra,* does not hold that after the expiration of the term at which a final judgment was entered the court has power to review matters which were in issue and were fully disposed of by the judgment, even if they were incorrectly decided. If such a power existed, litigation would never end. No such jurisdiction exists. *United States* v. *Throckmorton,* 98 U. S. 61, 65–69; *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 423–424.

2. Even if the court below were deemed to have power to grant the review sought, it committed no abuse of discretion in denying the petition. Incalculable confusion would result from the reopening of old tax cases merely because it was

asserted that questions had been decided incorrectly many years before, when no claim of corruption or fraud is involved

Neither is the claim of newly discovered evidence a sound basis for seeking review in this case now. The evidence was available to the taxpayer by the exercise of diligence prior to the hearing before the Board, since it was at all times completely within his control. At the hearing, he chose not to ask for adjournment to permit him to produce the very evidence now brought forward, but chose, instead, to rest upon the case as presented.

CONCLUSION

The decision below is clearly correct, and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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SAMUEL O. CLARK, JR.,
Assistant Attorney General,
SEWALL KEY,
J. LOUIS MONARCH,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

MARCH 1945.

APPENDIX

Internal Revenue Code:

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed On Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—

(1) *Upon mandate of Supreme Court.*—If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in ac-

cordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall

become final in the same manner as though no prior decision of the Board had been rendered.

(c) *Definitions.*—As used in this section—

(1) *Circuit Court of Appeals.*—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.*—The term "mandate", in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

(26 U. S. C., Sec. 1140.)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1003

WINTHROP TAYLOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

WALTER R. KUHN,
Counsel for Petitioner.

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Respondent's brief in opposition to the petition for a writ of certiorari is not confined to a consideration of the grounds or reasons specified by this Court in its Rule 38 upon which an application for certiorari must be based. The brief wanders somewhat from these basic considerations and discusses aspects of factual merits which, it would seem, might better be reserved for consideration in the event of the Court granting the writ. We shall endeavor to confine this reply brief to discussion of the grounds the Court has laid down as controlling in granting certiorari.

It should be emphasized, however, that there is no material dispute of fact involved in this proceeding. The

petition sets forth in complete detail the facts with respect to the sale by the petitioner in the months of October and November, 1929 of 35,000 shares of Public Service stock, of which 23,000 had been held for more than two years and constituted capital assets, the balance of 12,000 shares having been held for less than two years; that resulting from such sales the taxpayer's entire taxable net income for the year, *agreed to by the Commissioner,* was $538,011.74, *consisting exclusively of a capital net gain* upon which the taxpayer has fully paid (with interest) the tax of $69,540.83; that the Circuit Court arrived at a wholly negative conclusion, treated the entire capital gain as ordinary income (of which factually there was none) *and despite the express and positive finding stated in its opinion that the taxpayer had sold in October and November, 1929 at least 19,900 shares of Public Service shares held for more than two years constituting capital assets.* From this flagrant error a deficiency judgment resulted, with interest, of over $100,000, not a penny of which is justly due.

Such are the fundamental central facts, undisputed and indisputable and conceded by the respondent Commissioner as constituting a grossly unjust and "manifestly unconscionable" judgment. To the appeal in equity by the petitioner to the extraordinary and inherent powers of the Circuit Court for the correction of its error, the exclusive answer made by the respondent is to the effect that the Court lacked jurisdiction,—and this plea, we assume, was made by counsel "as in duty bound".

The Circuit Court "denied" the petition without opinion. Apparently such denial was based upon lack of jurisdiction since this was the plea in the respondent's answer, and also follows the interpretation of this Circuit Court in *Monjar* v. *Commissioner of Internal Revenue*, 140 F. 2d, 263, at 264-265, holding that where a denial, without opinion, was made by the Tax Court of a motion to reopen, it would be assumed that it was upon the ground of lack of jurisdiction.

POINT I

The Supreme Court has never passed on the question of jurisdiction.

Respondent's brief cites two decisions by this Court contending that they dispose of the question. These decisions are in *Helvering* v. *Northern Coal Company* (supra) and *R. Simpson & Company* v. *Commissioner* (supra). Neither of these cases involved an extraordinary proceeding in equity to vacate a tax judgment *concededly grossly unjust and manifestly unconscionable.* These cases involved the power of the Supreme Court to grant certiorari involving routine questions of tax law after the expiration of the thirty-day period and where under *its* rules its denial had become final. Nor did either of these cases adjudicate with respect to the inherent equity powers of the Circuit Court of Appeals to review and vacate a tax judgment *concededly grossly unjust and manifestly unconscionable* flowing from a fundamental factual error apparent upon the face of the Court's opinion, and confirmed by additional new evidence.

Under the circumstances presented the question of jurisdiction in connection with the construction of Section 1140 of the Internal Revenue Code is of real importance in the administration both of the tax law and of justice, a question which has never been decided by this Court but which should be.

POINT II

There is conflict among the Circuits.

Several of the Circuits have passed upon some aspects of this jurisdictional question. They are cited in respondent's brief. None of them involves an extraordinary pro-

ceeding in equity for the review and vacating of a concededly grossly unjust judgment.

The Fifth Circuit in the *Buttengenbach* case (supra) held that because of "extraordinary circumstances", doubtless appealing to the equity conscience of the Court, the Court reversed the Tax Board and reopened the case despite the lapse of the statutory period. In certain respects the *Buttengenbach* case is not dissimilar to the case at bar. As here, the Commission of Internal Revenue conceded the error, and also, as here, counsel, as a matter of duty, interposed a plea of lack of jurisdiction. The Circuit Court, however, despite the fact that four years had elapsed, overruled the jurisdictional plea, commenting that where there is no dispute as to the material facts "we see no reason either in law or in public policy why any proceeding where the rights of no third party have intervened may not be reopened".

Respondent's brief explains the *Buttengenbach* case by pointing out that the tax judgment was based upon a stipulation between the parties. This fact, however, did not render the tax judgment any less "final",—or does counsel for the respondent mean to suggest *that there are circumstances* giving power to the Circuit Court to review despite the lapse of the statutory period? If this be so, how about the "extraordinary circumstances" disclosed by the petition in the instant case?

In the case of *Sweet* v. *Commissioner* (supra) decided by the First Circuit, the Court refused to reopen a tax case two years after decision because of a different interpretation of the revenue laws involving certain deductions which the taxpayer sought the benefit of, the Court holding that under Section 1005 (1140) of the Internal Revenue Act there was finality. In its opinion the First Circuit referred to the opinion of the Fifth Circuit in the *Buttengenbach* case, stating that it "is supportable, if at all, *upon the peculiar circumstances* emphasized by the Court at page 631". While, therefore, not following the Fifth Circuit, the First Circuit recognized, inferentially

at least, that there *might* be circumstances of an extraordinary nature justifying the review of a tax judgment despite the provisions of Section 1140 of the Revenue Act,—such circumstances obviously being of an equitable nature.

In *White's Will* v. *Commissioner of Internal Revenue* (also cited by the respondent) the Third Circuit Court, while refusing to reopen a tax judgment after the lapse of the statutory period, referred to the decision of the Fifth Circuit in the *Buttengenbach* case as presenting "extraordinary circumstances" but not, directly at least, disagreeing with it.

The Second Circuit in the *Monjar* case (supra), cited by counsel for the respondent both in his answer and brief, refused to follow the *Buttengenbach* case, again referring, however, to the "extraordinary circumstances" which led the Fifth Circuit to reopen that case, and certainly not expressing disapproval of such action. If, as counsel for the respondent suggests in his brief, the Second Circuit in the instant case may have assumed jurisdiction and denied the petition in the exercise of judicial discretion, it would not have followed its own decision in the *Monjar* case, but rather that of the Fifth Circuit in the *Buttengenbach* case,—and thus confusion becomes worse confounded.

It would seem apparent that these divergences among the Circuits are at least indicative of considerable doubt and that there is a real conflict which this Court should resolve.

POINT III

The decision of this Court in the *Hazel-Atlas* case imposes a duty upon the Circuit Court to vacate grossly unjust and manifestly unconscionable judgments where there is no material fact in dispute.

If, as respondent's brief at page 13 suggests, the Circuit Court may have assumed jurisdiction and denied the peti-

tion in the exercise of judicial discretion, then plainly there was an abuse thereof in failing to follow the authority and principles established by the applicable decision of this Court in the *Hazel-Atlas* case,—which are not limited in application to grossly unjust judgments resulting from fraud. Where no material fact is in dispute this Court held that it was the duty of the Circuit Court to vacate its judgment.

CONCLUSION

Upon all or any of the three grounds above noted it is respectfully submitted that this Court should grant a writ of certiorari in accordance with the specifications set forth in Rule 38. The questions presented are of fundamental importance and should be clarified and decided in the interests of the true administration of tax laws and of justice.

In this respect respondent's brief (at p. 13) states:

> "Incalculable confusion would result from the re-opening of old tax cases merely because it was asserted that questions had been decided incorrectly many years before when no claim of fraud or corruption is involved."

Counsel for respondent apparently borrowed (in part) this phrase from the opinion of the Circuit Court in *Sweet* v. *Commissioner* (supra) without, however, giving the entire context. The Court stated:

> "Incalculable confusion would result from a general reopening of old tax cases *because of a claimed conflict with superseding court decisions.*" (Emphasis ours.)

This, of course, is quite different from the situation in the instant case. It should be apparent that the correction in equity of *concededly grossly unjust and manifestly un-*

conscionable judgments based upon a fundamental factual error apparent on the face of the Court's opinion would hardly lead to "incalculable confusion". On the contrary, the denial of such relief is rather to discredit both the administration of the Tax Law and of the judicial process in connection therewith and poisons the fount of justice. The exaction of an admittedly grossly unjust tax, on grounds of expediency, is a fundamental violation of rights long established by arduous effort and ultimately can have only evil results.

It is respectfully submitted that the petition for certiorari should be granted.

WALTER R. KUHN,
Counsel for Petitioner.

March, 1945.